

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DEBORAH BELEW-NYQUIST,

Plaintiff,

v.

QUINCY SCHOOL DISTRICT  
NO. 144,

Defendant.

NO. 2:19-CV-0215-TOR

ORDER ON PLAINTIFF'S MOTION  
FOR DEFAULT JUDGMENT,  
DEFENDANT'S MOTIONS FOR  
SUMMARY JUDGMENT, AND  
PARTIES' MOTIONS TO EXCLUDE

BEFORE THE COURT are Plaintiff's Motion for Default Judgment Re  
Spoliation (ECF No. 23), Defendant's Motion for Summary Judgment Re:  
Plaintiff's Claim for Lost Wages (ECF No. 30), Defendant's Motion for Summary  
Judgment (ECF No. 33), Plaintiff's Daubert Motion to Exclude Expert Opinion of  
Dr. Janet Barry (ECF No. 35), and Defendant's Daubert Motion to Exclude  
Testimony of Dr. Scott Menard (ECF No. 38). These matters were submitted for  
consideration with oral argument on November 5, 2020. Matthew Z. Crotty  
appeared on behalf of Plaintiff. Michael E. McFarland, Jr. appeared on behalf of

ORDER ON PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT,  
DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT, AND  
PARTIES' MOTIONS TO EXCLUDE ~ 1

1 Defendant. The Court has reviewed the record and files herein, and is fully  
2 informed. For the reasons discussed below, Plaintiff's Motion for Default  
3 Judgment Re Spoliation (ECF No. 23) is **DENIED**, Defendant's Motion for  
4 Summary Judgment Re: Plaintiff's Claim for Lost Wages (ECF No. 30) is  
5 **DENIED as moot**, Defendant's Motion for Summary Judgment (ECF No. 33) is  
6 **GRANTED**, Plaintiff's Daubert Motion to Exclude Expert Opinion of Dr. Janet  
7 Barry (ECF No. 35) is **DENIED as moot**, and Defendant's Daubert Motion to  
8 Exclude Testimony of Dr. Scott Menard (ECF No. 38) is **DENIED as moot**.

### 9 BACKGROUND

10 This case concerns alleged retaliation by Defendant Quincy School District  
11 ("QSD") against Plaintiff Dr. Belew-Nyquist for opposing what she perceived as  
12 an illegal request based on race to extend recognition for Associate of Arts degrees  
13 at a high school graduation ceremony. Defendant seeks summary judgment on  
14 Plaintiff's retaliation claims and damages. ECF Nos. 30, 33. Plaintiff seeks  
15 default judgment on the grounds that Defendant spoliated evidence. ECF No. 23.  
16 Additionally, the parties submitted motions to exclude expert testimony. ECF No.  
17 35, 38. Except where noted, the following facts are not in dispute.

#### 18 A. QSD Employment

19 On June 1, 2017, QSD hired Plaintiff Dr. Deborah Belew-Nyquist as QSD's  
20 high school principal. ECF No. 34 at 1, ¶ 1. In January 2018, Plaintiff told QSD

1 Superintendent John Boyd that she was considering resigning. ECF No. 75 at 27,  
2 ¶ 118. On February 12, 2018, at Plaintiff's request, QSD Assistant Superintendent  
3 Nik Bergman provided Plaintiff with a draft letter of recommendation. ECF No.  
4 34 at 7, ¶ 13.

5 On March 30, 2018, QSD School Board Member Alex Ybarra asked  
6 Plaintiff if his daughter could be featured at the upcoming high school graduation  
7 ceremony with other Running Start (college credit) students "on account of her  
8 race." ECF No. 75 at 10, ¶ 36. Mr. Ybarra believed that his daughter, who is  
9 Hispanic, would be a good role model for the largely Hispanic population within  
10 the QSD. ECF No. 34 at 2, ¶ 3. In early April 2018, Mr. Ybarra visited Plaintiff's  
11 office where he made the same request, again referencing his daughter's race;  
12 Plaintiff denied the request and informed Mr. Boyd. ECF No. 75 at 10, ¶ 36; ECF  
13 No. 90 at 64, ¶ 38. Plaintiff perceived Mr. Ybarra as angry during this meeting.  
14 ECF No. 75 at 10, ¶ 36. Mr. Ybarra denied being angry. ECF No. 75 at 11, ¶ 38.

15 Beginning in early April 2018, Plaintiff alleges Mr. Boyd repeatedly asked  
16 her to reconsider Mr. Ybarra's request which Plaintiff continued to oppose. ECF  
17 No. 75 at 10-11, ¶¶ 36, 39. Defendant denies that Mr. Boyd made repeated  
18 requests and claims that Mr. Boyd agreed with Plaintiff's decision. ECF No. 90 at  
19 34-35, ¶ 39. Following Plaintiff's refusals, Mr. Ybarra met with Mr. Boyd. ECF  
20 No. 37 at 11, ¶ 40; ECF No. 90 at 35, ¶ 40. On April 13, 2018, Mr. Boyd texted

1 Plaintiff requesting that she call him regarding Mr. Ybarra's request. ECF No. 75  
2 at 11, ¶ 41; ECF No. 90 at 35, ¶ 41. On April 23, 2018, Mr. Ybarra emailed  
3 Plaintiff regarding his request. ECF No. 75 at 11, ¶ 42; ECF No. 90 at 35, ¶ 42.

4 On April 25, 2018, Plaintiff alleges that Mr. Boyd asked Plaintiff "to give  
5 him something" to get Mr. Ybarra "off his back" regarding the graduation request.  
6 ECF No. 75 at 12, ¶ 44; ECF No. 34 at 4, ¶ 7. Mr. Boyd does not recall asking  
7 this, but Plaintiff remembers him "being angry and upset" during this conversation.  
8 ECF No. 75 at 12, ¶ 44. Mr. Boyd denies ever expressing anger towards Plaintiff  
9 regarding her decision. ECF No. 96 at 2, ¶ 3.

10 Throughout the month of May, Mr. Boyd and Plaintiff repeatedly met  
11 regarding Mr. Ybarra's request, and Plaintiff believes he became angry at the third  
12 or fourth meeting. ECF No. 75 at 12, ¶ 45. Mr. Boyd and Mr. Ybarra also had  
13 several conversations regarding Mr. Ybarra's daughter being recognized at  
14 graduation. ECF No. 75 at 14, ¶ 54. Mr. Boyd recalls telling Mr. Ybarra that he  
15 needed to "problem solve" or "attempt to work out the issue" with Plaintiff. ECF  
16 No. 75 at 14, ¶ 54; ECF No. 90 at 41, ¶ 54. Defendant alleges that Mr. Boyd  
17 supported Plaintiff's decision and expressed such support to Mr. Ybarra, who in  
18 turn became frustrated with Mr. Boyd. ECF No. 34 at 5, ¶ 10.

19 On May 8, 2018, Mr. Ybarra emailed Mr. Boyd a copy of his proposed  
20 motion to recognize Running Start students who would receive Associate of Arts

1 degrees at the QSD graduation ceremony. ECF No. 90 at 38, ¶ 46. Mr. Ybarra  
2 also emailed QSD School Board Member Chris Baumgartner about the proposed  
3 graduation policy change to which Mr. Baumgartner responded, “the only concern  
4 I had after talking with you were the optics did not look good for change at the  
5 high school board meeting.” ECF No. 75 at 12-13, ¶ 47. Mr. Boyd then texted  
6 Plaintiff regarding “a potential issue at the board meeting.” ECF No. 75 at 13,  
7 ¶ 48. That evening, Mr. Ybarra discussed the graduation issue at the board  
8 meeting. ECF No. 75 at 13, ¶ 49; ECF No. 90 at 39, ¶ 49.

9 On May 24, 2018, Mr. Ybarra raised the graduation issue at a second school  
10 board meeting. ECF No. 75 at 13, ¶ 51. Plaintiff alleges that Mr. Boyd told her  
11 not to attend this meeting because it would anger Mr. Ybarra. ECF No. 75 at 13,  
12 ¶ 51. Mr. Boyd does not recall why Plaintiff was asked not to attend the meeting.  
13 ECF No. 90 at 39, ¶ 51. Prior to this meeting, Mr. Boyd texted Plaintiff asking  
14 about the number of Running Start students who would be graduating and what  
15 their racial makeup was. ECF No. 75 at 13, ¶ 52. Mr. Boyd texted this to inquire  
16 into Mr. Ybarra’s point “that we should recognize our Hispanic students.” ECF  
17 No. 75 at 13, ¶ 52.

18 On May 29, 2018, the graduation issue was brought up at a third school  
19 board meeting. ECF No. 75 at 14, ¶ 53. The school board did not approve Mr.  
20 Ybarra’s request and the Running Start students, including Mr. Ybarra’s daughter,

1 were ultimately not recognized at the 2018 QSD high school graduation. ECF No.  
2 75 at 14, ¶ 55.

3 On June 1, 2018, at Plaintiff's request, Mr. Boyd emailed a draft letter of  
4 recommendation to Plaintiff. ECF No. 34 at 7, ¶ 14. This email stated "[h]ere is  
5 my draft. I am open to making some changes to match the position you are  
6 interested in and any grammatical changes." ECF No. 34 at 7, ¶ 15. This letter of  
7 recommendation noted Plaintiff's resignation would be a "loss" to QSD, Plaintiff  
8 was the top candidate for the QSD position, Plaintiff "persevered and succeeded in  
9 changing the trajectory of the high school," the QSD climate of relationships  
10 improved markedly under Plaintiff's leadership, Plaintiff is a "fierce advocate for  
11 all students," and Mr. Boyd believed Plaintiff's "constant stream of positive  
12 messaging to [students] individually and collectively has inspired many students to  
13 want to be better and achieve at higher levels." ECF No. 34 at 7-8, ¶ 16. Plaintiff  
14 alleges she expressed concern that the letter noted that Plaintiff overcame  
15 obstacles. ECF No. 75 at 25-26, ¶¶ 109-110. Mr. Boyd did not make Plaintiff's  
16 requested change to remove the language. ECF No. 75 at 25-26, ¶ 110.

17 On June 3, 2018, Plaintiff emailed Mr. Bergman asking that she be allowed  
18 to revise his letter of recommendation to direct the letter to specific prospective  
19 employers. ECF No. 34 at 8, ¶ 17. The next day, Mr. Bergman responded via  
20 email and agreed, telling Plaintiff "best of luck." ECF No. 34 at 8, ¶ 18.

1 On June 7, 2018, Mr. Bergman shared a Facebook post created by the  
2 Ombudsman Office Facebook page featuring Mr. Ybarra's daughter on QSD's  
3 Facebook page. ECF No. 75 at 15, ¶ 57, 16, ¶ 59; ECF No. 90 at 44, ¶ 59. Upon  
4 learning of the post, Plaintiff texted Mr. Boyd "I just saw the running start post on  
5 Facebook. Are you going to also feature other QHS students who will also be  
6 receiving their [Associate of Arts degrees] after graduation?" ECF No. 75 at 17,  
7 ¶ 65. Mr. Boyd responded, "Is that a question or a statement?" ECF No. 75 at 17,  
8 ¶ 65. Later that day at an award banquet, Plaintiff told both Mr. Boyd and Mr.  
9 Bergman that parents would perceive inequities that Mr. Ybarra's daughter was the  
10 only one to be featured on the QSD Facebook page. ECF No. 75 at 18, ¶ 66. Mr.  
11 Boyd allegedly told Plaintiff he did not want to talk about the issue anymore and  
12 Plaintiff perceived Mr. Boyd and Mr. Bergman's body language and mannerisms  
13 as uncomfortable. ECF No. 75 at 18, ¶ 66. Defendant denies that this interaction  
14 occurred. ECF No. 90 at 47, ¶ 66.

15 On June 11, 2018, Plaintiff submitted a letter of resignation to QSD. ECF  
16 No. 34 at 5, ¶ 11, 8, ¶ 19. This resignation marked Plaintiff's third sequential  
17 position where she left after only one year. ECF No. 34 at 5, ¶ 11. Mr. Ybarra  
18 emailed education advocate Jordan Posamentier "by the way, the high school  
19 principal resigned, about 2 hours ago. Not because of [the graduation issue] but  
20 I'm sure it helped make her decision." ECF No. 75 at 19, ¶ 70.

1 At the QSD high school graduation, Plaintiff observed Mr. Ybarra “actively  
2 shunning” her. ECF No. 75 at 19, ¶ 71. Plaintiff alleges Mr. Ybarra continued to  
3 express frustration with Plaintiff to other QSD employees. ECF No. 75 at 19, ¶ 72.

#### 4 **B. Post-QSD Employment**

5 On June 21, 2018, a professional search firm contacted Mr. Bergman  
6 regarding a reference check for Plaintiff. ECF No. 34 at 14, ¶ 39. During the  
7 phone call, Mr. Bergman commented: “[Plaintiff] resigned her position[,] if she  
8 had not resigned we would have kept her on as Principal. Due to the way she left  
9 and resigned her position, we would not hire her again. She did a great job and  
10 brought a lot of professionalism to the school. Before [Plaintiff] arrived the staff  
11 struggled to conduct a professional meeting and she gave the staff a lot of self-  
12 worth brought a lot of pride and energy to the school.” ECF No. 40-1 at 6. That  
13 same day, Plaintiff alleges Mr. Bergman told her he would no longer provide a  
14 favorable reference. ECF 75 at 29, ¶ 128. Defendant denies Mr. Bergman said  
15 this, and asserts that Plaintiff continued to use Mr. Bergman’s letter of  
16 recommendation. ECF No. 90 at 76, ¶ 128.

17 On June 26, 2018, Mr. Boyd completed a reference check for Plaintiff  
18 requested by the Bethel School District. ECF No. 34 at 9, ¶ 21, ECF No. 75 at 49,  
19 ¶ 21. Mr. Boyd rated Plaintiff as an 8 on a scale of 1-10. ECF No. 34 at 9, ¶ 23.  
20 Mr. Boyd reported that Plaintiff “works cooperative and collaboratively with

1 staff.” ECF No. 34 at 10, ¶ 24. He also reported that Plaintiff “took over a very  
2 challenging culture and climate at [QSD High School] and was able to turn a toxic  
3 situation into a much more harmonious culture.” ECF No. 34 at 10, ¶ 25. When  
4 asked if Plaintiff would be considered for a re-hire position at QSD, Mr. Boyd  
5 answered “yes.” ECF No. 34 at 10, ¶ 26. Plaintiff also used the letter of  
6 recommendation from Mr. Bergman in support of the application to the position  
7 within the District. ECF No. 34 at 9, ¶ 22.

8 On June 29, 2018, Mr. Boyd completed Plaintiff’s performance evaluation.  
9 ECF No. 34 at 9, ¶ 20. The evaluation was based on a scale of 1 to 4, with 1  
10 representing “unsatisfactory” and 4 representing “distinguished.” ECF No. 34 at 9,  
11 ¶ 20. The evaluation consisted of eight categories, and Mr. Boyd rated Plaintiff as  
12 an overall 3 representing that Plaintiff was “proficient.” ECF No. 34 at 9, ¶ 20.  
13 Plaintiff claims that Mr. Boyd said she would receive a 4 in the majority of the  
14 eight categories, and believes she deserves a rating of 4 in all eight categories.  
15 ECF No. 34 at 9, ¶ 20.

16 On July 2, 2018, Northshore School District contacted Mr. Boyd regarding a  
17 reference for Plaintiff. Mr. Boyd rated Plaintiff as “distinguished” in 5 categories,  
18 “highly proficient” in 6 categories, and “proficient” in 9 categories. ECF No. 34 at  
19 10, ¶ 28. Mr. Boyd did not rate Plaintiff in either of the lower categories of  
20

1 “developing” or “unsatisfactory.” ECF No. 34 at 10, ¶ 28. Mr. Boyd’s comments  
2 stated:

3 [Plaintiff] has, over the course of the school year made tremendous  
4 progress in how adults in the building interact with each other.  
5 Simply put, the climate of relationships among staff, students and  
6 administration has improved markedly under her leadership. Staff  
7 survey results point to a much happier staff more focused on student  
8 learning. On [sic] aspect of [Plaintiff’s] leadership worth mentioning  
9 is how she encourages and supports teachers and staff to become  
10 leaders. She mentored two new teachers to become the school’s data  
11 experts and presenters of information so that staff is more adept at  
understanding and using data to inform practice. [Plaintiff] is a fierce  
advocate for all students and constantly reinforces the idea that they  
are capable and full of potential. She knows her students by name,  
strength and need and always encourages students to reach beyond  
self-imposed limitations. I believe, had [Plaintiff] stayed in the  
position longer, she would have made significant progress with the  
school and would have grown in the areas in which I rated her on the  
lower end of proficient.

12 ECF No. 34 at, 10-11, ¶ 29. Overall, Mr. Boyd recommended Plaintiff for the  
13 position with Northshore School District. ECF No. 34 at 11, ¶ 30.

14 That same day, the Quincy Valley Post Register printed a story regarding  
15 Plaintiff’s resignation. ECF No. 34 at 17, ¶ 48. This first article included  
16 comments on Plaintiff’s resignation from Mr. Boyd, Mr. Baumgartner, and Mr.  
17 Ybarra. ECF No. 40-6 at 2-3. Mr. Boyd said he was disappointed in Plaintiff’s  
18 resignation, Mr. Baumgartner said Plaintiff developed a reputation as “an assertive,  
19 progressive, hard-working principal who tried to the best she could do,” and Mr.  
20 Ybarra said “[he] just didn’t get the feeling that [Plaintiff] was excited . . . just

1 before the end of the school year.” ECF No. 40-6 at 2-3.

2 On July 6, 2018, the Quincy Valley Post Register printed a second story  
3 regarding Plaintiff’s resignation. ECF No. 34 at 17, ¶ 48. This second article  
4 detailed Mr. Boyd’s process on hiring a principal following Plaintiff’s resignation.  
5 ECF No. 40-6 at 4-5. On responding to the timing of Plaintiff’s resignation that  
6 required a search for an interim principal, Mr. Boyd stated that he did not know  
7 why Plaintiff resigned and commented “[t]here is no ‘normal’ when it comes to  
8 resignations . . . . The timing is tough, but it could have been later and that would  
9 have been worse. She’s resigned; I have accepted the resignation.” ECF No. 40-6  
10 at 4. After being asked whether Plaintiff’s resignation was based on a conflict with  
11 QSD’s “top brass,” Mr. Boyd said “[y]ou’re going to have to ask her” and added “I  
12 wish her all the best. We are going to regroup and find another principal for the  
13 building.” ECF No. 40-6 at 5.

14 In August 2018, Plaintiff applied for a Coordinator, Visual Arts, World  
15 Language, Physical Education position with the Kent School District. ECF No. 75  
16 at 38, ¶ 173. On September 28, 2018, Mr. Boyd completed a reference check  
17 requested by Kent School District. ECF No. 34 at 11, ¶ 31. Mr. Boyd rated  
18 Plaintiff as “excellent” in 3 categories, “very good” in 7 categories, and “good” in  
19 4 categories. ECF No. 34 at 11, ¶ 32. Mr. Boyd also indicated he would rehire  
20 Plaintiff if given the opportunity. ECF No. 34 at 12, ¶ 33. Mr. Boyd commented,

1 “[Plaintiff] had the skills and abilities to be an excellent principal in [QSD] – the  
2 location was not the best fit given the small size of the district. Employee is  
3 eligible for re-hire, but would hope that the commitment would be for an extended  
4 period of time.” ECF No. 34 at 12, ¶ 34. Plaintiff alleges this reference contained  
5 misrepresentations because her ratings could have been higher; as an example, Mr.  
6 Boyd rated Plaintiff as “good” in Ethics but could point to no specific instances of  
7 issues with Plaintiff’s ethics. ECF No. 75 at 54-55, ¶¶ 32-34.

8 On September 19, 2019, Mr. Boyd completed an email reference for  
9 Plaintiff at the request of Clover Park School District. ECF No. 34 at 12, ¶ 35.  
10 Mr. Boyd rated Plaintiff “very good” in 6 categories and “good” in 1 category.  
11 ECF No. 34 at 12, ¶ 35. When asked if given the opportunity to re-employ  
12 Plaintiff, Mr. Boyd commented: “We offered for her to remain in the position.”  
13 ECF No. 34 at 12, ¶ 35.

14 On or about March 28, 2019, Plaintiff applied for a position with Pacific  
15 Beach Elementary School within the North Beach School District. ECF No. 34 at  
16 12, ¶ 36. Plaintiff did not receive an in-person interview or job offer. ECF No. 34  
17 at 12, ¶ 36. Between March 28, 2019 and April 8, 2019, Plaintiff spoke with North  
18 Beach School District Superintendent Andrew Kelly over the phone. ECF No. 34  
19 at 12, ¶ 36. On or about April 9, 2019, Plaintiff learned she did not get the  
20 position. ECF No. 75 at 37, ¶ 170. Plaintiff then called Mr. Kelly and he told her

1 that he could not originally get ahold of Mr. Boyd for a reference check but later  
2 had a conversation with him. ECF No. 75 at 38, ¶¶ 171-172. Mr. Kelly expressed  
3 that his decision was not affected by any statement or conduct from any QSD  
4 employee. ECF No. 34 at 13, ¶ 36. Plaintiff disputes this by speculating the  
5 decision to not hire her only followed Mr. Kelly's conversation with Mr. Boyd.  
6 ECF No. 75 at 38, ¶ 172.

7 On or about January 4, 2019, Plaintiff applied for a position within the  
8 Richland School District. ECF No. 34 at 13, ¶ 37. Plaintiff interviewed for the  
9 position and Plaintiff was ranked third among the four finalists for the position.  
10 ECF No. 34 at 13, ¶ 37; ECF No. 75 at 34, ¶ 149. During the hiring process,  
11 Richland School District reached out to Plaintiff's listed references and former  
12 employers, including Mr. Boyd. ECF No. 34 at 13, ¶ 37. Mr. Boyd did not  
13 respond to the District's inquiry. ECF No. 34 at 13, ¶ 37. Plaintiff did not get the  
14 position because the Richland School District hired an internal candidate. ECF  
15 No. 34 at 13, ¶ 37. To follow up, Plaintiff called Tony Howard, an employee of  
16 Richland School District, who allegedly told her that numerous attempts to contact  
17 Mr. Boyd "caused them to have great concerns" and that "it was a red flag." ECF  
18 No. 75 at 34, ¶¶ 150-151. Plaintiff sent a follow up email to Mr. Howard  
19 expressing concern that no QSD employee returned a phone call reference, which  
20 Mr. Howard did not dispute. ECF No. 75 at 35, ¶¶ 154-155. A representative of

1 Richland School District has since stated that the decision not to hire Plaintiff was  
2 not based on Mr. Boyd's lack of response. ECF No. 34 at 13-14, ¶ 37.

3 On or about July 2, 2019, Plaintiff applied for the Principal position at  
4 Sequim Middle School within the Sequim School District. ECF No. 34 at 14, ¶ 38.  
5 Plaintiff was not selected for an interview because the district was concerned that  
6 Plaintiff's past three jobs lasted for one year or less. ECF No. 34 at 14, ¶ 38.  
7 According to the Assistant Superintendent of Sequim School District, the decision  
8 not to interview was based on Plaintiff's job history rather than any conversations  
9 with Mr. Boyd. ECF No. 34 at 13, ¶ 38. However, Plaintiff disputes the District's  
10 rationale because the Assistant Superintendent called Mr. Boyd "out of curiosity"  
11 regarding Plaintiff's application. ECF No. 75 at 32, ¶ 142. During that  
12 conversation, Mr. Boyd declined to comment on Plaintiff's job performance based  
13 on the advice of QSD counsel. ECF No. 90 at 84, ¶¶ 145, 147.

#### 14 **C. Expert Testimony and Discovery**

15 On or about June 29, 2020, Plaintiff identified Dr. Scott Menard as an expert  
16 to provide a report, testimony, and opinion regarding Plaintiff's claims. ECF No.  
17 34 at 15, ¶ 41. In his report, Dr. Menard states that "the administrators of [QSD]  
18 adversely affected [Plaintiff's] ability to attain employment" by failing to return  
19 reference check phone calls to North Beach and Richland School Districts. ECF  
20 No. 34 at 15, ¶ 42. At both the July 15, 2020 and September 1, 2020 depositions,

1 Dr. Menard acknowledged that he had never spoken to anyone affiliated with  
2 North Beach or Richland School District. ECF No. 34 at 15-16, ¶¶ 43-44. Dr.  
3 Menard also acknowledged that he had “no way of knowing” which prospective  
4 employers contacted QSD about Plaintiff. ECF No. 34 at 16, ¶ 43. Finally, Dr.  
5 Menard testified that he was unable to state whether potential communications  
6 between Defendant and prospective employers had any influence on the decision  
7 and does not know why Plaintiff was not chosen for interviews and/or  
8 employment. ECF No. 34 at 17, ¶ 47.

9 With the exception of Kent School District, Plaintiff did not depose anyone  
10 employed or affiliated with any school district to which she applied following her  
11 resignation from QSD. ECF No. 34 at 15, ¶ 40.

## 12 DISCUSSION

### 13 A. Defendant’s Motions for Summary Judgment

14 Defendant seeks summary judgment on Plaintiff’s retaliation claims and  
15 damages. ECF Nos. 30, 33. As described below, Defendant’s Motion for  
16 Summary Judgment on Plaintiff’s retaliation claims is dispositive. Therefore,  
17 Defendant’s Motion for Summary Judgment Re: Plaintiff’s Claim for Lost Wages  
18 is denied as moot.

#### 19 1. *Summary Judgment Standard*

20 The Court may grant summary judgment in favor of a moving party who

1 demonstrates “that there is no genuine dispute as to any material fact and that the  
2 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In ruling  
3 on a motion for summary judgment, the court must only consider admissible  
4 evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002). The  
5 party moving for summary judgment bears the initial burden of showing the  
6 absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S.  
7 317, 323 (1986). The burden then shifts to the non-moving party to identify  
8 specific facts showing there is a genuine issue of material fact. *See Anderson v.*  
9 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla  
10 of evidence in support of the plaintiff’s position will be insufficient; there must be  
11 evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.  
12 Moreover, “mere allegation and speculation do not create a factual dispute for  
13 purposes of summary judgment.” *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-  
14 82 (9th Cir. 1996) (internal citation omitted).

15 For purposes of summary judgment, a fact is “material” if it might affect the  
16 outcome of the suit under the governing law. *Id.* at 248. Further, a dispute is  
17 “genuine” only where the evidence is such that a reasonable jury could find in  
18 favor of the non-moving party. *Id.* The Court views the facts, and all rational  
19 inferences therefrom, in the light most favorable to the non-moving party. *Scott v.*  
20 *Harris*, 550 U.S. 372, 378 (2007). Summary judgment will thus be granted

1 “against a party who fails to make a showing sufficient to establish the existence of  
2 an element essential to that party’s case, and on which that party will bear the  
3 burden of proof at trial.” *Celotex*, 477 U.S. at 322.

## 4 2. *Plaintiff’s Retaliation Claims*

5 Defendant seeks summary judgment on Plaintiff’s federal and state  
6 retaliation claims on the grounds that Plaintiff cannot establish a *prima facie* case  
7 of retaliation. ECF No. 33. Plaintiff opposes Defendant’s Motion, arguing that  
8 there are material issues of fact that preclude summary judgment. ECF No. 74.

9 Title VII prohibits an employer from retaliating against employees or former  
10 employees that oppose a practice prohibited by Title VII. *Burlington N. & Santa*  
11 *Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006); *Robinson v. Shell Oil Co.*, 519 U.S.  
12 337, 346 (1997). Courts follow the *McDonnell Douglas* burden-shifting  
13 framework where a plaintiff must first establish a *prima facie* case of retaliation.  
14 *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002). If the  
15 plaintiff meets this burden, the burden shifts to the defendant to articulate a  
16 legitimate, nondiscriminatory reason for the challenged action. *Id.* at 1062. If the  
17 defendant meets this burden, the plaintiff must show that the defendant’s proffered  
18 reason is “pretextual.” *Id.*

19 To establish a *prima facie* case of retaliation, a plaintiff must show “(1) the  
20 plaintiff engaged in a protected activity, (2) the plaintiff suffered an adverse

1 employment action, and (3) there was a causal link between the plaintiff's  
2 protected activity and the adverse employment action.” *Poland v. Chertoff*, 494  
3 F.3d 1174, 1179-80 (9th Cir. 2007).

4 a. Protected Activity

5 The Court addressed Plaintiff's protected activity in its Order denying  
6 Defendant's prior Motion for Summary Judgment. *See* ECF No. 22. Thus, the  
7 protected activity – opposing what Plaintiff believed to be race-based favoritism at  
8 a graduation ceremony – is not at issue in the current Motion.

9 b. Adverse Employment Action

10 Defendant identified several of Plaintiff's claimed adverse employment  
11 actions, as discussed below. ECF No. 33. Plaintiff claims that there are other  
12 instances of retaliation but all of Plaintiff's allegations rest on the same categories  
13 that Defendant identified. ECF No. 75 at 48.

14 An employment action is adverse if it is reasonably likely to deter  
15 employees from engaging in protected activity. *Ray v. Henderson*, 217 F.3d 1234,  
16 1243 (9th Cir. 2000). This is an objective standard that “often depends on a  
17 constellation of surrounding circumstances, expectations, and relationships which  
18 are not fully captured by a simple recitation of the words used or the physical acts  
19 performed.” *White*, 548 U.S. at 69.

1 The Ninth Circuit has broadly defined adverse employment actions to  
2 include negative job references and undeserved negative performance reviews. *See*  
3 *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000); *Lyons v. England*,  
4 307 F.3d 1092, 1118 (9th Cir. 2002). However, adverse actions do not include  
5 “trivial harms” such as snubbing or offensive comments outside the job reference  
6 context. *Burlington*, 548 U.S. at 68-69 (finding “trivial harms” and “‘snubbing’ by  
7 supervisors and co-workers” do not constitute adverse employment actions);  
8 *Brooks*, 229 F.3d at 929 (stating that badmouthing an employee outside the job  
9 reference does not constitute an adverse employment action).

10 i. Statements to the Press

11 There are two newspaper articles at issue regarding Plaintiff’s resignation.  
12 *See* ECF No. 40-6. The first article, published on July 2, 2018, included comments  
13 on Plaintiff’s resignation from Mr. Boyd, Mr. Baumgartner, and Mr. Ybarra. ECF  
14 No. 40-6 at 2-3. Mr. Boyd said he was disappointed in Plaintiff’s resignation, Mr.  
15 Baumgartner said Plaintiff developed a reputation as “an assertive, progressive,  
16 hard-working principal who tried to the best she could do,” and Mr. Ybarra said  
17 “[he] just didn’t get the feeling that [Plaintiff] was excited . . . just before the end  
18 of the school year.” ECF No. 40-6 at 2-3.

19 The second article, published on July 6, 2018, detailed Mr. Boyd’s process  
20 on hiring a principal following Plaintiff’s resignation. ECF No. 40-6 at 4-5. On

1 responding to the timing of Plaintiff's resignation that required a hunt for an  
2 interim principal, Mr. Boyd stated that he did not know why Plaintiff resigned and  
3 commented "[t]here is no 'normal' when it comes to resignations . . . . The timing  
4 is tough, but it could have been later and that would have been worse. She's  
5 resigned; I have accepted the resignation." ECF No. 40-6 at 4. After asked  
6 whether Plaintiff's resignation was based on a conflict with QSD's "top brass,"  
7 Mr. Boyd said "[y]ou're going to have to ask her" but added "I wish her all the  
8 best. We are going to regroup and find another principal for the building." ECF  
9 No. 40-6 at 5.

10 Here, most of the comments regarding Plaintiff are neutral or positive. To  
11 the extent that any comments were negative, such comments constituted snubbing  
12 or badmouthing outside of the job reference context, amounting to mere trivial  
13 harm. Therefore, the Court finds that these statements to the press do not  
14 constitute an adverse employment action.

15 ii. Statements to Professional Search Firm

16 When a professional search firm, not a prospective employer, contacted Mr.  
17 Bergman, he commented: "[Plaintiff] resigned her position if she had not  
18 resigned[,] we would have kept her on as Principal. Due to the way she left and  
19 resigned her position, we would not hire her again. She did a great job and brought  
20 a lot of professionalism to the school. Before [Plaintiff] arrived[,] the staff

1 struggled to conduct a professional meeting and she gave the staff a lot of self-  
2 worth [and] brought a lot of pride and energy to the school.” ECF No. 40-1 at 6.  
3 Following this reference, the search firm noted that Mr. Boyd’s “tone of voice  
4 [was] professional and polite.” ECF No. 40-1 at 6.

5 Here, Plaintiff isolates one statement from Mr. Boyd – that he would not hire  
6 her again – out of context from the rest of the reference. Mr. Boyd’s other  
7 statements were certainly favorable towards Plaintiff. Taking Mr. Boyd’s  
8 comments in context, collectively, and in the light most favorable to Plaintiff, there  
9 is no material question of fact that this was a positive job reference.

10 In any event, the professional search firm was not a prospective employer.

11 iii. Failure to Return Phone Calls

12 The parties do not cite to any authority governing whether failure to return  
13 phone calls in the job reference context constitutes an adverse employment action.  
14 Plaintiff has submitted expert testimony which claims failure to return phone calls  
15 adversely affects a job applicant’s opportunity to be hired. ECF No. 34 at 15, ¶ 42.  
16 But here, Plaintiff offers no statement from a prospective employer that this  
17 occurred and was the reason she did not get hired. At this stage, drawing all  
18 reasonable inferences in light most favorable to Plaintiff, there is no material  
19 question of fact, other than pure speculation, that this constituted an adverse  
20 employment action.

1           iv.       Performance Evaluation

2           Here, Plaintiff alleges that Mr. Boyd promised her “an outstanding  
3 performance evaluation” but Mr. Boyd disputes that this promise was made. ECF  
4 No. 90 at 67, ¶ 108. While Plaintiff takes issue with comments she perceives as  
5 negative, she does not assert that anything in the evaluation is undeserved or that  
6 the evaluation was sub-average. ECF No. 36-1 at 36-37. Therefore, Plaintiff’s  
7 above-average evaluation does not “rise to the level of an adverse employment  
8 action by the employer.” *Lyons*, 307 F.3d at 1118; *see Kortan v. California Youth*  
9 *Auth.*, 217 F.3d 1104, 1112-13 (9th Cir. 2000) (finding no adverse action stated  
10 because “evaluation was not sub-average or undeserved”).

11           v.       Statements to Prospective Employers

12           Here, there are two forms of communications to prospective employers at  
13 issue: online reference checks and oral communications. ECF No. 33 at 9. As to  
14 the online reference checks, Mr. Boyd and Mr. Bergman provided positive  
15 references and Plaintiff has pointed to no evidence that any statements were  
16 undeserved. ECF No. 33 at 9; ECF No. 74. As to the oral communications,  
17 Plaintiff relies on pure speculation that negative references occurred. ECF No. 33  
18 at 9; ECF No. 74. Therefore, statements to prospective employers, if any, were not  
19 adverse employment actions. Even if Plaintiff could demonstrate an adverse  
20 employment action, Plaintiff fails to demonstrate the necessary causation.

1 c. Causation

2 Defendant argues that Plaintiff cannot establish causation where she relies  
3 solely upon speculative assertions. ECF No. 33 at 9. Plaintiff argues that multiple  
4 issues of material fact exist as to whether there is causation based on allegations of  
5 employer dishonesty, unequal treatment, unworthy explanations, discriminatory  
6 patterns, evasive testimony, and proximity in time of protected activity and adverse  
7 action. *See* ECF No. 74 at 9-15.

8 To demonstrate causation under Title VII, the plaintiff must “establish that  
9 his or her protected activity was a but-for cause of the alleged adverse action by the  
10 employer.” *University of Texas Southwestern Medical Ctr. v. Nassar*, 570 U.S.  
11 338, 362 (2013). To show a but-for cause, the plaintiff must show that “the  
12 unlawful retaliation would not have occurred in the absence of the alleged  
13 wrongful action or actions of the employer.” *Id.* at 360. Causation “can be  
14 inferred from circumstantial evidence such as the employer’s knowledge of the  
15 protected activities and the proximity in time between the protected activity and  
16 the adverse action.” *Dawson v. Entek Intern.*, 630 F.3d 928, 936 (9th Cir. 2011).

17 Here, proximity in time does not help Plaintiff; she received (and continued  
18 to receive) letters of recommendation and positive reference checks *after* the  
19 protected activity. Notably, on June 1, 2018, Mr. Boyd emailed a draft letter of  
20 recommendation to Plaintiff. ECF No. 34 at 7, ¶ 14. Moreover, on June 3, 2018,

1 Plaintiff emailed Mr. Bergman to request that she revise his letter of  
2 recommendation to direct the letter to specific prospective employers. ECF No. 34  
3 at 8, ¶ 17. The next day, Mr. Bergman responded via email and agreed, telling  
4 Plaintiff “best of luck.” ECF No. 34 at 8, ¶ 18. Only after her resignation did QSD  
5 employees express frustration over Plaintiff’s choice to stay for only one year.  
6 ECF No. 40-1 at 6. Even then, QSD employees continued to serve as positive  
7 references. *See supra* at 8-14.

8 In an attempt to rebut this sequence of events, Plaintiff relies on  
9 circumstantial evidence that is largely speculation and based on inadmissible  
10 evidence. *See* ECF No. 74 at 9-15. As to claims of employer dishonesty,<sup>1</sup> Plaintiff  
11 seems to take issue that Mr. Boyd and Mr. Bergman gave positive references while  
12 also stating they would not personally rehire her due to her short stay at QSD;  
13 those two assertions are not contradictory and are not evidence of dishonesty. ECF  
14 No. 74 at 9. As to claims of unequal treatment that Mr. Boyd “promptly” returned

15 \_\_\_\_\_  
16 <sup>1</sup> Plaintiff also alleges “employer dishonesty” for Mr. Boyd and Mr.  
17 Bergman’s occasional failure to recall specific conversations by citing to dicta in a  
18 Ninth Circuit dissenting opinion. ECF No. 74 at 10. The Court finds that the  
19 specific failure to recall conversations did not go to any material fact where there is  
20 no evidence of negative communications to prospective employers.

1 reference calls for another QSD employee, Mr. Boyd also returned calls for  
2 Plaintiff, and there is no evidence that the other QSD employee was in a similar  
3 situation to Plaintiff, i.e. resigned after one year. ECF No. 74 at 10. As to  
4 Plaintiff's remaining claims, Plaintiff relies on speculation and irrelevant evidence.  
5 *See* ECF No. 74 at 11-15; ECF No. 89. Therefore, Plaintiff has failed to  
6 demonstrate a *prima facie* case of retaliation.

7 Even if Plaintiff established a *prima facie* case, Defendant satisfied its'  
8 burden for putting forth a legitimate, nondiscriminatory reason for the challenged  
9 action. In this case, Defendant provided evidence that any of Defendant's  
10 employee's unwillingness to personally rehire Plaintiff at QSD was the result of  
11 Plaintiff's resignation after one year. ECF No. 33 at 6. Plaintiff cannot utilize her  
12 own speculation to establish pretext. Therefore, Plaintiff has not demonstrated that  
13 there are triable issues of fact as to her federal retaliation claim.

14 Because Plaintiff cannot establish a *prima facie* case of retaliation, the Court  
15 need not address Defendant's argument that Plaintiff cannot establish damages.  
16 ECF No. 33 at 13.

17 d. State Retaliation Claim

18 Defendant seeks summary judgment on Plaintiff's state law retaliation claim  
19 on the same grounds as her federal retaliation claim. ECF No. 33 at 20. Plaintiff  
20 argues that the state law retaliation claim should survive because it is "construed

1 more broadly and more liberally” than the federal retaliation claim. ECF No. 74 at  
2 21.

3         Mirroring Title VII, the Washington Law Against Discrimination  
4 (“WLAD”) prohibits an employer from retaliating against a person who engages in  
5 protected activities. RCW 49.62.010. Due to the similar framework, “Washington  
6 courts often look to federal case law on Title VII when interpreting the WLAD.”  
7 *Blackburn v. State*, 186 Wash. 2d 250, 258 (2016). However, where Title VII  
8 requires a plaintiff to show that the protected activity was “but-for” cause of the  
9 adverse employment action, the WLAD requires a plaintiff to show that the  
10 protected activity was a “substantial factor” causing the adverse employment  
11 action. *Jin Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171*, 189 Wash. 2d 607, 612  
12 (2017) (quoting *Allison v. Hous. Auth. of City of Seattle*, 118 Wash. 2d 79, 95  
13 (1991)).

14         For the same reasons Plaintiff’s federal retaliation claim fails, so too does  
15 the state retaliation claim. Even under the less stringent causation standard,  
16 Plaintiff fails to demonstrate that her protected activity was a substantial factor of  
17 the adverse employment action. As discussed above, Plaintiff relies on her own  
18 speculative assertions to establish causation. This cannot survive the  
19 overwhelming weight of Defendant’s positive employment references following  
20

1 her protected activity. Therefore, Plaintiff has also failed to establish a *prima facie*  
2 case of state law retaliation.

### 3 **B. Plaintiff's Motion for Default Judgment**

4 Plaintiff moves for default judgment and seeks attorneys' fees and costs on  
5 the grounds that Defendant "failed to preserve relevant electronic evidence once on  
6 notice of potential litigation and failed to issue a litigation hold letter." ECF No.  
7 23 at 10, 21. Defendant argues that there is no spoliation of evidence where  
8 Plaintiff's motion is based on "speculative assertions that certain events must have  
9 occurred." ECF No. 42 at 20. Defendant also argues that even if spoliation  
10 occurred, default judgment is a drastic sanction that is not warranted under the  
11 circumstances. *Id.*

12 Under Rule 37(e), the moving party must show: (1) the nonmoving party  
13 should have preserved the electronically stored information ("ESI") in anticipation  
14 or conduct of litigation, (2) the nonmoving party lost the ESI because it failed to  
15 take reasonable steps to preserve it, and (3) additional discovery cannot restore or  
16 replace the ESI. Fed. R. Civ. P. 37(e).<sup>2</sup> If the moving party satisfies all three  
17  
18

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19 <sup>2</sup> Plaintiff also urges the Court to use its inherent power to sanction as an  
20 alternative to Rule 37. ECF No. 70 at 5-6. However, Rule 37(e) "forecloses

1 elements, two kinds of sanctions are available. *Id.* First, if the spoliation  
2 prejudiced the other party, the Court may order measures no greater than necessary  
3 to cure the prejudice. *Id.* Second, if the nonmoving party acted with intent to  
4 deprive the moving party of the ESI, the Court may (1) presume that the lost  
5 information was unfavorable to the party, (2) instruct the jury that it may or must  
6 presume the information was unfavorable to the party, or (3) dismiss the action or  
7 enter default judgment. *Id.* The remedy of default judgment under Rule 37 “is  
8 very severe.” *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482  
9 F.3d 1091, 1096 (9th Cir. 2007).

10 *1. Duty to Preserve*

11 “As soon as a potential claim is identified, a litigant is under a duty to  
12 preserve evidence which it knows or reasonably should know is relevant to the  
13 action.” *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1067 (N.D.  
14 Cal. 2006). Absolute preservation is not required, rather “[a] party should only be  
15 penalized for destroying documents if it was wrong to do so, and that requires, at a  
16 minimum, some notice that the documents are potentially relevant.” *Akiona v*  
17 *United States*, 938 F.2d 158, 161 (9th Cir. 1991).

18 \_\_\_\_\_  
19 reliance on inherent authority” to address ESI spoliation. 2015 Advisory  
20 Committee Notes. In any event, there is no sanctionable conduct.

1 Plaintiff alleges that Defendant had a duty to preserve QSD employee  
2 emails, text messages, and phone logs. ECF No. 23. As to the emails, Defendant  
3 certifies that QSD has not destroyed any emails that were sent and saved through  
4 the QSD server. ECF No. 42 at 10. As to the text messages, the Court already  
5 determined that Defendant had no legal right over the text messages that Plaintiff  
6 sought because they were personal text messages on personal devices not used for  
7 work-related purposes. ECF No. 85 at 6. Moreover, the Court finds that personal  
8 text messages were not potentially relevant to Plaintiff's claim of negative job  
9 references "[i]n light of the fact that reference checks are not done via text." ECF  
10 No. 42 at 11. As to the phone logs, these do not record what was said in a case  
11 where Plaintiff speculates that Mr. Boyd and Mr. Bergman were "telling"  
12 prospective employers "false and misleading" things. ECF No. 42 at 13. Even if  
13 the ESI and phone logs were relevant to Plaintiff's claims, Plaintiff also fails to  
14 make a showing under the final two prongs.

15 2. *Lost ESI*

16 The moving party has the burden of showing that ESI existed and was  
17 subsequently destroyed or not preserved. *Gomez v. Stop & Shop Supermarket Co.*,  
18 670 F.3d 395, 399 (1st Cir. 2012). ESI is not "lost" if it is available from an  
19 alternative source. *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 328 F.R.D.  
20 543, 552 (N.D. Cal. 2018) (collecting cases). However, mere speculation that

1 deleted documents may exist is insufficient. *Reinsdorf v. Skechers U.S.A., Inc.*,  
2 296 F.R.D. 604, 631 (C.D. Cal. 2013).

3 Here, Plaintiff speculates that Defendant “retaliated against her by either not  
4 returning reference checks from prospective employers or giving poor reference  
5 checks to prospective employers.” ECF No. 23 at 3. Out of the school districts  
6 that provided responsive documents, not a single district provided evidence of any  
7 text message, email, or phone call that demonstrated “false and misleading”  
8 information about Plaintiff. ECF No. 42 at 4. This is consistent with Defendant’s  
9 claim that such evidence never existed and with prospective employers’ claims that  
10 any decision not to hire Plaintiff was not the result of any communication with  
11 QSD employees. *Id.* Thus, Plaintiff is merely relying on her own speculation that  
12 such documents once existed. *See* ECF No. 70. Because Plaintiff cannot  
13 demonstrate that ESI existed, Plaintiff cannot demonstrate that ESI was lost.

### 14 3. *Restoration or Replacement*

15 Finally, Plaintiff must show that additional discovery cannot restore or  
16 replace the ESI. Fed. R. Civ. P. 37(e). Plaintiff is seeking communications  
17 allegedly made to prospective employers; the most obvious replacement of such  
18 information is through direct testimony of the prospective employers. Tellingly,  
19 Plaintiff did not depose any prospective employer, with the exception of one  
20 employee from the Kent School District (ECF No. 76-16), who may have spoken

1 with a QSD employee in the job reference context (ECF No. 77 at ¶ 19). ECF No.  
2 34 at 15, ¶ 40. To the contrary, Defendant produced declarations from prospective  
3 employers demonstrating that any decision not to hire Plaintiff was not influenced  
4 by communications from QSD employees. ECF Nos. 37-4, 37-5, 91, 93-94. Thus,  
5 if such information was available by way of deposition or declaration; Plaintiff  
6 merely chose not to seek it.

7 The Court finds that Plaintiff has failed to demonstrate spoliation of ESI  
8 evidence. Even if a degree of spoliation were found, the severe remedy of default  
9 judgment is not warranted where there is no competent evidence that Defendant  
10 acted with the intent to deprive Plaintiff of such evidence. Therefore, Plaintiff's  
11 Motion for Default Judgment is denied.

### 12 **C. Parties' Motions to Exclude**

13 As Plaintiff has failed to establish a *prima facie* case for retaliation and  
14 summary judgment is granted in Defendant's favor, the parties' Motions to  
15 Exclude are denied as moot.

### 16 **ACCORDINGLY, IT IS HEREBY ORDERED:**

17 1. Plaintiff's Motion for Default Judgment Re Spoliation (ECF No. 23) is

18 **DENIED** and the Court declines to award fees or costs to either party.

19 2. Defendant's Motion for Summary Judgment Re: Plaintiff's Claim for

20 Lost Wages (ECF No. 30) is **DENIED as moot**.

3. Defendant's Motion for Summary Judgment (ECF No. 33) is

**GRANTED.** All claims against Defendant are dismissed with prejudice.

4. Plaintiff's Daubert Motion to Exclude Expert Opinion of Dr. Janet Barry (ECF No. 35) is **DENIED as moot.**

5. Defendant's Daubert Motion to Exclude Testimony of Dr. Scott Menard (ECF No. 38) is **DENIED as moot.**

6. All remaining hearings, deadlines and trial are **VACATED.**

The District Court Executive is directed to enter this Order, enter judgment for Defendant, furnish copies to counsel, and **CLOSE** the file.

**DATED** November 20, 2020.



*Thomas O. Rice*  
THOMAS O. RICE  
United States District Judge